

A person does not incur Retailers' Occupation Tax liability on the gross receipts from an isolated or occasional sale. See 86 Ill. Adm. Code 130.110. (This is a GIL.)

October 2, 2007

Dear Xxxxx:

This letter is in response to your letter dated September 19, 2007, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

This request for a Private Letter Ruling is made on behalf of our client, ABC, an Illinois not-for-profit corporation organized exclusively for charitable, educational and scientific purposes ('ABC'). Neither an audit nor litigation is pending with the Illinois Department of Revenue ('Department') involving ABC or, to the best of our knowledge, the issue presented below. To the best of our knowledge and that of ABC, (i) the Department has not previously ruled on the same or similar issues presented below for ABC or a predecessor; and (ii) neither ABC nor any representative of ABC has previously submitted the same or similar issue to the Department but withdrew it before a letter ruling was issued. We have found no authority contrary to the views expressed below. A Power of Attorney is attached.

BC will be holding a charity auction ('Auction') at which ABC will auction ITEMS commissioned by ABC and displayed along the location. All proceeds from the Auction will benefit environmental education programs, including the expansion of Conservation Clubs in CITY's public schools. The Auction will be conducted by AUCTIONEER, which has graciously donated its services. ABC holds legal title to the ITEMS to be sold at the Auction. At issue is whether the sale of the ITEMS at the Auction will be subject to Retailers' Occupation Tax ('ROT').

About the ITEMS

The City has, this summer, been hosting an innovative project that uses the medium of public art to inspire individuals and organizations to take action against global warming. The exhibit features over 100 ITEMS commissioned by ABC and displayed along the LOCATION from the LOCATIONS. The ITEMS were created by artists from around the world using a variety of materials to transform their plain white spheres to create awareness and provoke discussion about potential solutions to global warming [sic]. The exhibit also features 200 mini-ITEMS displayed around the City that also depict solutions to global warming. The mini-ITEMS were designed by some of the same artists who are working on the full-sized ITEMS, as well as by celebrities, and students participating in CITY's after school arts program for teens.

The premise of the exhibit is very similar to the 1999 Cows on Parade exhibition: Various artists began with the same object — in this case a six-foot tall white sphere — and then painted, decorated, and otherwise modified it to express an individual theme or style. Sponsors have paired with the artists to cover the costs of production. Each of the ITEMS is intended to represent a solution to or strategy for addressing global warming.

About ABC

ABC was organized in June 2006, as an Illinois not-for-profit corporation, to be operated, according to its Charter, exclusively for charitable, educational and scientific purposes, including the following:

1. installing and maintaining public art exhibits showing solutions to global warming;
2. hosting public speeches and providing educational literature related to global warming and environmental issues;
3. providing funding and assistance to schools and cultural institutions for exhibits and activities related to global warming; and
4. any other charitable, educational or scientific purposes and activities for which corporations may be organized and operated under the State of Illinois General Not For Profit Corporation Act of 1986, as amended, subject to the requirements and restrictions of Internal Revenue Code Section 501(c)(3) and other relevant provisions of federal, state and local laws.

Copies of its Charter and By-Laws are attached as Exhibits A and B, respectively.

As required by the Charitable Trust Act of Illinois and the Solicitation for Charity Act of Illinois ABC has registered with the Attorney General's Office. ABC has also filed IRS Form 1023, Application for Recognition of Exemption Under Section 503(c)(3) of the Internal Revenue of 1986 as amended. Its application for exempt status was approved in January 2007.

ABC was organized and its activities are conducted on a not-for-profit basis with no personal profit inuring to anyone as a result of its operation. Moreover, it has no capital structure or capital stock, no provision for disbursing dividends and pays no director's fees. Finally, ABC is not engaged in the business of selling tangible personal property.

Applicable Law

In general, not-for-profit corporations, even if exclusively engaged in charitable, religious or educational activities, are subject to ROT when selling tangible personal property at retail. 86 Ill. Adm. Code 130.2005(a). However, there are limited exemptions from ROT available to exclusively charitable, religious and educational organizations provided the organization qualifies as an 'exclusively' charitable, religious or educational organization or institution. 86 Ill. Adm. Code 130.2005(a)(1)(A).

One such available exemption, known as the Noncompetitive Sales Exemption, provides that sales by exclusively charitable, religious or educational organizations are not subject to ROT when it can be said that such selling is noncompetitive with business establishments. 86 Ill. Adm. Code 130.2005(a)(3). The regulations provide that the following tests are to be used in determining whether such selling is noncompetitive:

1. The transactions are conducted by members of the charitable entity and not by any franchisee or licensee.
2. All of the proceeds must go to the charity.
3. The transaction must not be a continuing one but rather should be held either annually or a reasonably small number of times during the year. The test of reasonableness is an administrative decision to be made by the Department of Revenue.
4. The reasonable ascertainable dominant purpose of most of the transferees of the items sold must be the making of a charitable contribution, with the transfer of property being merely incidental and secondary to the dominant purpose of making a gift to the charity.

86 Ill. Adm. Code 130.2005(a)(3)(B)(i)-(iv).

Further consideration is given to the nature of the item sold, the character of the sale and the real practical effect upon punitive competition. 86 Ill. Adm. Code 130.2005(a)(3)(C)(i)-(ii).

A second available exemption, the Occasional Dinners and Similar Activities Exemption, provides that occasional dinners, socials or other similar activities which are conducted by exclusively charitable, religious or educational organizations or institutions are not taxable, whether or not such activities are open to the public. This exemption extends to occasional dinners, ice cream socials, fun fairs, carnivals, rummage sales, bazaars, bake sales and the like, when conducted by exclusively charitable, religious or educational organizations or institutions, whether the items are purchased or donated for purposes of the sale and even if the sale is open to the public. 86 Ill. Adm. Code 130.2005(a)(4)(A).

For purposes of this exemption, 'occasional' means not more than twice in any calendar year. 86 Ill. Adm. Code 130.2005(a)(4)(B). The exemption does not, however, extend to 'occasional' sales of hats, greeting cards, cookbooks, flag kits and other similar items because the selling of these kinds of items at retail, even on an occasional basis, does generally place the selling organization in substantial competition with business establishments. 86 Ill. Adm. Code 130.2005(a)(4)(C).

Under the Regulations, an organization cannot qualify as being organized and operated exclusively for charitable purposes unless it is organized and conducted on a not-for-profit basis, with no personal profit inuring to anyone as a result of the organization's operation. The payment of reasonable salaries to necessary employees for services actually rendered does not convert a nonprofit enterprise into a business enterprise. 86 Ill. Adm. Code 130.2005(h). Other conditions that must be met to be an exclusively charitable organization are as follows:

1. In the case of a corporation, there can be no capital structure, no capital stock, no provision for disbursing dividends or other profits and no payment of director's fees.
2. The entity must be organized and operated to benefit an indefinite number of the public.

86 Ill. Adm. Code 130.2005(i).

Finally, in the case of a corporation, the purpose for which it is organized is determined by reference to its Charter. 130.2005(j).

Analysis and Conclusion

Clearly, as its Charter and By-laws indicate, ABC was organized for and is operated exclusively for charitable and educational purposes. Its activities are conducted on a not-for-profit basis with no personal profit inuring to the benefit of anyone. It has no capital structure or capital stock, no provision for the payment of dividends and it does not pay director's fees.

Because ABC was organized exclusively for charitable and educational purposes, ABC's sale of the ITEMS at the Auction falls within the purview of both the Noncompetitive Sales and Occasional Dinners and Other Activities Exemptions. First and foremost, as indicated in its Charter, ABC was organized for exclusively charitable and educational purposes.

With respect to the Noncompetitive Sales Exemption it can be said that the sale of the ITEMS at the auction is noncompetitive with business establishments. The ITEMS are original works of art that cannot be found at any other business establishment. Moreover, the auction will not be conducted by a franchisee or licensee, all of the proceeds will go to the charity, the Auction is a one time event, and the reasonable ascertainable dominant purpose of most of the transferees of the items sold will be the making of a charitable contribution. Finally, there will be no effect on the punitive competition. Clearly, the Auction falls within the guidelines set out in Regulation Section 130.2005(a)(3).

ABC auction also falls within the Occasional Dinners and Similar Activities Exemption afforded by Regulation Section 130.2005(a)(4). ABC will conduct the Auction and all proceeds from the Auction will be used by ABC exclusively for educational purposes. As indicated above, occasional dinners and similar activities held by exclusively charitable, religious or educational organizations are exempt from ROT. We believe the Auction, which will consist of the sale of the ITEMS, items of tangible personal property that have

been donated to and are owned by ABC, is a 'similar activity' which falls squarely within the purview of this exemption.

Applicability of the Occasional Sale Exemption

Additionally, ABC's Auction falls within the scope of the Occasional Sale Exemption. See 86 Ill. Adm. Code 130.110. As indicated, AUCTIONEER has agreed to donate its services to conduct the Auction. If an auctioneer acts for an unknown principal and sells tangible personal property to a purchaser for his/her use or consumption, the auctioneer incurs ROT based upon the gross receipts from the sale. 86 Ill. Adm. Code 130.1915(a)(1). If the auctioneer acts on behalf of a known principal and sells tangible personal property to a purchaser for his/her use or consumption, the principal incurs ROT if the principal is engaged in the business of selling such tangible personal property at retail. 86 Ill. Adm. Code 130.1915(a)(2). However, if an auctioneer acts for a known principal who is not in the business of selling tangible personal property to purchasers for use or consumption, no ROT would be due because ROTA does not impose a tax upon persons who are not engaged in the business of selling tangible personal property. Such sales transactions fall within the scope of the occasional sales exemption to the ROT. 86 Ill. Adm. Code 130.110.

As previously indicated, ABC is not in the business of selling tangible personal property to purchasers for their use or consumption. As a result, ABC may, in addition to the exemptions available to it as an exclusively charitable or educational organization, avail itself of ROTA's occasional sales exemption so long as there is proper disclosure of the fact that ABC, an isolated or occasional seller, is the principal in the auction setting and that the property sold belongs to ABC.

Request for Ruling

On behalf of ABC we respectfully request that the Department, on the basis of the facts and law set forth above, issue a Private Letter Ruling concluding that the Auction to be held at the Auditorium Theatre on October 5, 2007 at which the ITEMS will be sold will not be subject to ROT.

Thank you for your consideration of this Private Letter Ruling Request. We would be happy to meet with you to discuss this matter further if you believe such a meeting is warranted.

DEPARTMENT'S RESPONSE:

This letter is in response to your Private Letter Ruling request dated September 19, 2007 regarding your client ABC. Whether to issue a Private Letter Ruling in response to a request for such a ruling is within the discretion of the Department. See subpart (a)(4) of 2 Ill. Adm. Code 1200.110. The Private Letter Ruling Committee has decided that it will not issue a Private Letter Ruling in regards to your request. However, we are providing you with the following general information that may be useful in determining your client's tax liability.

You have inquired about certain limited exemptions from sales tax by businesses that are recognized by the Department as being exclusively charitable, religious, or educational. See 86 Ill. Adm. Code 130.2005(a). Please note that these limited exemptions are only available for entities

that have been first been recognized by the Department as being exclusively charitable, religious, or educational through the issuance of an exemption number or "E-number."

You have also inquired about sales conducted in auction situations. When auctioneers or agents are involved in selling activities, the person who may be liable for Retailers' Occupation Tax will depend on whether the auctioneer or agent is working on behalf of a disclosed or undisclosed principal. See 86 Ill. Adm. Code 130.1915. This rule applies to consignment transactions, as well.

An auctioneer or agent acting on behalf of an unknown or undisclosed principal is considered to be the owner of the tangible personal property that will be sold and is responsible for paying Retailers' Occupation Tax on the gross receipts from those sales as well as filing sales tax returns.

However, if the auctioneer or agent is acting on behalf of a known or disclosed principal, the sale of the tangible personal property is taxable to the principal and not the auctioneer or agent. A principal is deemed to be disclosed to a purchaser for use or consumption only when the name and address of such principal is made known to such purchaser at or before the time of the sale and when the name and address of the principal appears upon the books and records of the auctioneer or agent. See subsection (b) of Section 130.1915. For example in regards to the sale of art works by an artist, if the artist is disclosed as described in subsection (b) of Section 130.1015, the artist would incur Retailers' Occupation Tax liability if that artist is in the business of selling art. Please be advised, however, that if the tangible personal property being sold would constitute an occasional sale by the disclosed principal, then the sale is not considered a taxable retail sale. This is not likely to be the case with artists who are engaged in the business of selling their works.

The Department's regulations discuss what is meant by an "occasional sale." See 86 Ill. Adm. Code 130.110. Occasional sales are sales in which the items being sold were first purchased for use by the seller and are no longer needed. An example of an occasional sale would be when a retailer disposes of machinery that he has used and no longer needs, and which he does not otherwise engage in selling. See Section 130.110(b). Another example is a civic organization that purchases or acquires materials that are used for advertising or display as part of its organizational purpose and then sells those materials when they are no longer needed. However, sales do not qualify as isolated or occasional sales if the seller holds itself out as being engaged in the retail sale of that type or similar type of tangible personal property. The sale of the ITEMS referenced in your letter may readily fall within the occasional sale exclusion from tax under the Retailers' Occupation Tax Act.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

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